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FILED
JAN 9 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 371

NATIONAL BROADCASTING COMPANY, INC., *Petitioner*

v.

PHILCO CORPORATION, *Respondent*

RESPONSE OF THE RESPONDENT TO MEMORANDUM FOR THE UNITED STATES

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The Statement of the Federal Communications Commission is largely confined to two basic concepts. The first is that the decision below is incorrect and the second is that the decision "can thus have a grave effect upon the Commission's ability to control its docket and allocate its energies and attentions to the problems whose merits are most deserving."[1] Neither of these contentions is correct.

The soundness of the decision below we believe to be amply demonstrated in the Memorandum for the

[1] Statement of the Federal Communications Commission at p. 7 of Memorandum for the United States, National Broadcasting Company, Inc. v. Philco Corporation, No. 371.

United States and in respondent's brief. Nor do we believe that this case calls upon the Commission to allocate its energies and attention to problems whose merits are not "most deserving."

The protest filed by the respondent with the Federal Communications Commission alleges that RCA and NBC have pursued a consistent course toward monopoly since their creation. Set forth therein is pending litigation involving RCA-NBC from 1946 through 1957, all alleging illegal conduct. The protest showed that the propriety of current practices of RCA-NBC has been seriously questioned in two reports issued from Congressional sources.[2]

The seriousness of the problems involved in the activities set forth in the Philco protest is emphasized by the fact that since the protest was filed: (1) RCA has been indicted, convicted, and fined for violating the criminal provisions of the antitrust laws;[3] (2) a private action against RCA for alleged violations of the antitrust laws has just recently been settled by RCA paying the plaintiff a very substantial sum of money;[4] (3) a consent decree has been entered in a civil suit brought by the Government against RCA and directed at RCA's patent abuses in the communications field.[5]

[2] *The Television Broadcasting Industry*, H.R. Rep. No. 604, 85th Cong., 1st Sess. (1957). *The Television Inquiry*, Senate Report, Committee Print No. 2, Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess. (1957).

[3] United States v. Radio Corporation of America, Criminal Action No. 155-107 (U.S.D.C.S.D.N.Y. 1958).

[4] Zenith Radio Corporation v. Radio Corporation of America, C.A. No. 1247, filed Aug. 9, 1949, U.S.D.C. Del.

[5] United States v. Radio Corporation of America, C.A. No. 97-38, filed March 15, 1957, U.S.D.C.S.D.N.Y.

(4) RCA has been named as a co-conspirator (but not a defendant) in an antitrust suit brought by the United States, charging that the defendants engaged with other co-conspirators to restrain foreign trade and commerce between the United States and Canada in radio and television receiving sets.[6] The effect of these activities on RCA competitors, such as Philco, was described by the Assistant Attorney General with reference to the criminal suit as follows:

> "When business practices inhibit the normal operation of an industry essential to our civilian economy and defense program, and deter the competitive expansion of scientific research in the increasingly important area of electronics, as alleged in this case, they become a threat not only to our system of free enterprise but also to our national security. The practices charged to have been employed by the defendant were allegedly consciously adopted and are of long-standing duration.
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> * * *
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> ". . . By this criminal action we seek to restore competition in this significant industry so that all competitors of RCA can compete with it at every level from the research laboratory to the sale of end products."[7]

Both before the filing of the Philco protest, and after its dismissal by the Commission, as to parties other than RCA-NBC, the Commission has insisted that conduct involving possible violation of the antitrust or other laws warrants a hearing as to the party's fitness

[6] United States v. General Electric Company, Westinghouse Electric Corporation, and N. V. Philips' Gloeilampenfabrieken, C.A. No. 140-157, filed Nov. 24, 1958.

[7] U. S. Department of Justice, Press Release, February 21, 1958.

to be a licensee.[8] This view was restated by the Commission as recently as December 4, 1958, in its Decision in *Connecticut Water Company*, Docket No. 12323-24. In denying a license it stated:

> "On the contrary, the Commission, in its general public interest determinations, has an obligation to consider any relevant anti-trust matters. *National Broadcasting Company* v. *United States*, 319 U.S. 190."

This inconsistency as to RCA-NBC can hardly be justified by the Commission as necessary to preserve control of its docket.

In these circumstances it is respectfully submitted that the decision below is not only correct in law but that a contrary result would have been inimical to the public interest which, in the last analysis, must rise.

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[8] See Bulova and Henshel (Mester), 3 Pike & Fischer RR 125 (1946), *aff'd sub nom.* Mester v. United States, 70 F. Supp. 118 (E.D.N.Y.), *aff'd per curiam*, 332 U.S. 749 (1947); Mansfield Journal Co. v. Federal Communications Commission, 86 U.S. App. D.C 102, 180 F. 2d 33 (1950) and the decision of the Commission in Page Boy, Inc., 8 Pike & Fischer RR 1108 (1954), *aff'd per curiam sub nom.* Klein v. Federal Communications Commission, 98 U.S. App. D.C. 73, 232 F. 2d 73 (1956), for the Commission's interpretation of its authority prior to the Philco protest.

Since the Philco protest the Commission has again considered the qualifications of the Mansfield Journal Co. and has concluded that a substantial question still exists as to whether the Mansfield Journal Co. engages in and will continue to engage "in business practices tending toward the suppression of competition and the attainment of a monopoly in advertising and news dissemination." In spite of Mansfield's claim that it has undergone a 100% change in ownership and management, the Commission has indicated that a hearing on its qualifications is necessary in the light of its past history. See letter from the Secretary of the Federal Communications Commission to Mansfield Journal Co., issued under FCC File No. 65823.

above considerations of alleged administrative inconvenience.

Respectfully submitted,

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